Supreme Court, U.S.
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No. 09-1299

In the Supreme Court of the United States

DONNIE CLEVELAND LANCE,
Petitioner,

v.

HILTON HALL, Warden,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITIONER'S REPLY BRIEF

L. Joseph Loveland
Counsel of Record
James W. Boswell
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: 404-572-4600
Facsimile: 404-572-5100
jloveland@kslaw.com

Attorneys for Petitioner Donnie Cleveland Lance

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. RESPONDENT IGNORES PETITIONER'S ARGUMENT THAT THE GEORGIA SUPREME COURT ACTED CONTRARY TO CONTROLLING PRECEDENT BY FINDING THAT THE NATURE OF PETITIONER'S CRIME RESULTED IN A FINDING OF NO PREJUDICE. 2

II. THE GEORGIA SUPREME COURT CANNOT CIRCUMVENT THIS COURT'S PRECEDENT BY FINDING FACTS ON APPEAL AT ODDS WITH THE TESTIMONY OBSERVED BY THE POSTCONVICTION COURT. 4

III. PETITIONER'S CLAIM REGARDING THE FAILURE TO OBTAIN CO-COUNSEL IS PROPERLY BEFORE THIS COURT AND WARRANTS REVIEW. 9

IV. CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Brown v. Allen,
344 U.S. 443 (1953) 5

Cooper Indus. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 5

Gasperini v. Ctr. for Humanities, Inc.,
518 U.S. 415 (1996) 5

Hall v. Terrell,
679 S.E.2d 17 (Ga. 2009) 6

Head v. Carr,
273 Ga. 613 (2001) 6

House v. Bell,
547 U.S. 518 (2006) 5

Porter v. McCollum,
130 S. Ct. 447 (2009) 1, 2, 4, 8

Rompilla v. Beard,
545 U.S. 374 (2005) 1, 2, 3, 5, 9

Strickland v. Washington,
466 U.S. 688 (1984) 2, 3, 4, 9, 11

Wiggins v. Smith,
539 U.S. 510 (2003) 1, 2, 9, 11

Williams v. Taylor,
529 U.S. 362 (2000) 1, 2, 4, 8, 9

For reasons set forth here and in the petition, the Georgia Supreme Court turned the clock back twenty-five years on this Court's Sixth Amendment jurisprudence when it reversed the habeas court's decision vacating the death penalty to which petitioner had been sentenced. First, the Georgia Supreme Court disregarded the requirements of this Court's controlling precedents in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Porter v. McCollum*, 130 S. Ct. 447 (2009), when it reversed the habeas court on the ground that the admittedly ineffective assistance of counsel did not prejudice petitioner "as a matter of law." All of these cases recognize that a defendant may be prejudiced by counsel's failure to present mitigating mental health evidence even when the nature of the crimes may be indisputably brutal or horrific. Second, the lower court improperly attempted to circumvent this precedent by re-characterizing the habeas court's factual findings without the required determination of clear error. Finally, the lower court failed to recognize that counsel's prejudicial ineffective assistance in failing to discover and present mitigating mental health evidence stemmed, in part, from the trial court's refusal to appoint co-counsel requested by trial counsel, a refusal that runs directly contrary to American Bar Association standards, which this Court in *Strickland* and *Wiggins* declared to represent reasonable and prevailing norms of effective assistance of counsel.

I. RESPONDENT IGNORES PETITIONER'S ARGUMENT THAT THE GEORGIA SUPREME COURT ACTED CONTRARY TO CONTROLLING PRECEDENT BY FINDING THAT THE NATURE OF PETITIONER'S CRIME RESULTED IN A FINDING OF NO PREJUDICE.

Donnie Cleveland Lance was represented in his death penalty trial by a single lawyer who failed to conduct any investigation into his mental health and thus offered no evidence at the sentencing phase of the trial on petitioner's significant mental impairments. Petitioner's principal argument in support of certiorari is that the Georgia Supreme Court's determination that, despite the admittedly insufficient investigation and presentation by his counsel, petitioner was not prejudiced "as a matter of law" because of the brutal nature of the murders at issue cannot be reconciled with this Court's decisions in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Porter v. McCollum*, 130 S. Ct. 447 (2009). Remarkably, respondent ignores this argument in his response. Indeed, respondent's brief never refers to *Rompilla*, *Wiggins*, *Williams*, or *Porter*, apparently viewing the jurisprudence on prejudice to have begun and ended with *Strickland v. Washington*, 466 U.S. 688 (1984).

Respondent's failure to address this Court's recent controlling precedents is understandable since the Georgia Supreme Court's decision simply cannot be reconciled with the holdings in those cases. Respondent does not deny that both the habeas court and the Georgia Supreme Court agreed that trial counsel's failure to investigate petitioner's mental

health or to present *any* evidence of petitioner's mental impairments during the sentencing phase of his trial constituted ineffective assistance of counsel. The only question is whether that ineffective assistance was prejudicial to petitioner in his capital defense. The Georgia Supreme Court cited the horrific nature of the murders as justification for its finding that "as a matter of law" the ineffective assistance of petitioner's trial counsel would not have led the jury to reach a different decision and thus did not result in any prejudice to petitioner under *Strickland*. Apparently concluding that the more brutal the crime, the less important mitigating evidence becomes, the Georgia Supreme Court reversed the habeas court's determination and, in doing so, violated fundamental constitutional principles previously affirmed by this Court. Respondent makes no effort whatsoever to explain how this approach can be squared with this Court's decisions.

The Georgia Supreme Court erroneously applied the prejudice analysis of *Strickland* by speculating that, because of the "overwhelming and deliberate nature of Lance's crimes," the outcome of petitioner's trial and sentencing would not reasonably have been affected by new evidence of his mental health. Pet. App. 14a. Respondent devotes much of his opposition to recounting what are indisputably brutal and horrific facts regarding the crime. But it is precisely because the crime was brutal — and thus likely to inflame the emotions of the jury — that the mitigating evidence of petitioner's mental impairments was so crucial for the jury to hear in deciding whether petitioner should live or die. Indeed, the controlling cases *all* involved brutal crimes. *E.g.*, *Rompilla*, 545 U.S. at 374 (finding that "the murder was committed during a felony, that it

was committed by torture, and that Rompilla had a significant history of felony convictions indicating the use or threat of violence"); *Williams*, 529 U.S. at 367 (noting that the trial court found Williams murdered his victim with a mattock after he refused to lend Williams a couple of dollars); *Porter*, 130 S. Ct. at 448 (finding that Porter murdered his former girlfriend and her new boyfriend after driving past her house each of the two days prior to her murder and becoming drunk at a cocktail lounge before shooting them both). The Georgia Supreme Court's holding of no prejudice "as a matter of law" due to the nature of the crime is directly contrary to the U.S. Supreme Court precedents and mandates review by this Court.

II. THE GEORGIA SUPREME COURT CANNOT CIRCUMVENT THIS COURT'S PRECEDENT BY FINDING FACTS ON APPEAL AT ODDS WITH THE TESTIMONY OBSERVED BY THE POSTCONVICTION COURT.

Respondent mischaracterizes petitioner's challenge to the Georgia Supreme Court's prejudice analysis under *Strickland* as a "mere disagreement with the factual resolution" of the claims, contending that the Georgia Supreme Court's decision therefore presents nothing warranting review by this Court. Brief in Opp. at 13-14. This argument, however, highlights the fatal flaw in the Georgia Supreme Court's constitutional review of petitioner's claims: the Georgia Supreme Court purported to reach a "factual resolution" of claims by substituting its read of the cold record for the fact-findings of the habeas court, but it never concluded — because it could not — that any of those fact findings were clearly erroneous.

Appellate courts, either at the state or the federal level, are not supposed to find facts or weigh evidence they do not hear from witnesses they do not observe. *See Brown v. Allen*, 344 U.S. 443, 535 (1953) ("elementary in all appellate procedure [is] that the findings of fact on a trial are to be accepted by an appellate court in absence of clear showing of error") (superseded by 28 U.S.C. 2254(d)(2) only with regard to federal court de novo review of state court determinations of fact). As this Court has long recognized, a trial court, "seeing the demeanor of witnesses, hearing the parties, giving to each case far more time than an appellate court can give, is in a better position to unravel disputes of fact than is an appellate court on a printed transcript." *Id.*; *see also House v. Bell*, 547 U.S. 518, 559 (2006) (noting that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 448-49 (2001) (trial courts "have an undeniably superior vantage over courts of appeals" with regard to fact finding, because they "view the evidence not on a 'cold paper record,' but 'in the living courtroom context' . . . They can assess from the best seats the vital matter of witness credibility.") (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996)). Recasting as "weak" what the habeas court concluded was "strong" evidence of impairment in an effort to take this case out of the controlling precedents articulated in *Rompilla* and the other cases discussed above is a classic example of reshuffling the factual deck that this Court should not allow.

Under its own decisions and principles of due process, the Georgia Supreme Court was supposed to review the habeas court's legal determinations for legal error and its factual determinations for clear error, a point respondent does not dispute. *See, e.g.*, *Hall v. Terrell*, 679 S.E.2d 17, 21 (Ga. 2009) (the Georgia Supreme Court accepts a habeas court's findings of fact unless they are clearly erroneous); *Head v. Carr*, 273 Ga. 613, 616 (2001) (same). On the facts as found by the habeas court and applying the U.S. Supreme Court's controlling precedent, it is clear that the habeas court properly granted relief. The Georgia Supreme Court's reversal of the habeas court was improper for two reasons. First, with respect to the facts, the Georgia Supreme Court never concluded that any of the habeas court's findings were clear error, and for good reason — the findings were all grounded in the extensive evidence that the habeas court had carefully evaluated. And second, with respect to the law, there is no attempt to reconcile the Georgia Supreme Court's decision with the U.S. Supreme Court's most relevant precedent. Instead, respondent's entire Brief in Opposition depends on highlighting "facts" conjured up by the Georgia Supreme Court and ignoring the teachings of controlling precedent.

On numerous occasions, respondent's arguments turn on characterizations of the evidence by the Georgia Supreme Court that conflict with findings of the habeas court that were never found to be clearly erroneous. For example, the habeas court found that petitioner suffers from "significant mental impairments" due to his history of car wrecks, drinking, and getting shot in the head. The habeas court explained its finding as follows:

> While the mental health experts had varying opinions as to the degree and effect of Petitioner's mental impairments, *all of the mental health experts, including those employed by Respondent, testified that Petitioner suffered from mental impairments that render Petitioner borderline mentally retarded, and all provided testimony that would have been extremely important for the jury to consider . . .*

Pet. App. 89a (emphasis added). Giving no deference to the habeas court's impressions of live expert testimony, the Georgia Supreme Court second guessed the habeas court's determinations, finding instead that

> aspects of [Lance's mental health evidence] showed merely that Lance functioned, when sober, in the lower range of normal intelligence; that he had some memory problems; that he suffered some depression related to his inability to accept his divorce; that he suffered some difficulty in planning and problem solving; that he might have been somewhat impulsive; and that his functional intelligence, unsurprisingly, become more impaired when he was drunk.

Pet. App. 13a. Likewise, the habeas court noted that the mental health experts testified that petitioner suffered from borderline mental retardation, contrary to respondent's reliance on the Georgia Supreme Court's unsupported suggestions that petitioner was merely "moderate[ly] slow[]". Brief in Opp. at 12; Pet. App. 97a.

Stated simply, respondent's brief — like the decision of the Georgia Supreme Court that it seeks to

defend — selectively ignores the well-supported findings of the habeas court to create an impression of a widespread agreement among the experts that petitioner's mental deficiencies were limited. Brief in Opp. at 8. But the habeas court's findings of fact regarding the opinions of the mental health experts were clearly supported by the experts' testimony and the record before it, and no amount of recasting of this evidence can obscure the habeas court's finding that "*all [of the experts] provided testimony that would have been extremely important for the jury to consider . . .*" Pet. App. 89a (emphasis added). As petitioner pointed out in his initial filing, the standard is not whether these facts would have necessarily led the jury to a different decision, but whether there is a "reasonable probability" that one or more jurors might have reached a different decision, such that the confidence in the process is undermined. Pet. at 21-22. Respondent's arguments to the contrary on pages 5 and 6 of his Brief in Opposition are unavailing when the Georgia Supreme Court made no determination of clear error with respect to the factual finding of the habeas court.

This is a compelling case for this Court to review. If a state appellate court can avoid complying with this Court's binding precedents by recasting facts on appeal and determining that the recast facts mean that "as a matter of law" there is no prejudice, precedent can always be easily circumvented. In *Williams v. Taylor*, for example, the Virginia Supreme court could have simply "found," contrary to the habeas court, that Mr. Williams was not "borderline mentally retarded" and had not "suffered repeated head injuries." 529 U.S. 362, 370 (2000). Likewise, in *Porter v. McCollum*, the Florida Supreme Court could have simply found that

Mr. Porter did not have "heroic" war service, had not been abused as a child, and did not have a "brain abnormality." 130 S. Ct. 447, 454 (2009). And in *Rompilla*, the Georgia Supreme Court could have simply "found" that Mr. Rompilla did not have "schizophrenia and other disorders," 545 U.S. at 390, but instead only limited mental impairments that would not have been compelling to a jury. This Court's pronouncements regarding ineffective assistance of counsel claims can only be given effect if the court tasked with making factual findings after an evidentiary hearing is given deference in its factual findings and is not second-guessed on appeal. The Georgia Supreme Court failed to give proper deference to the factual findings of the habeas court and thus performed an end-run around the constitutional requirements by "finding" facts aimed toward turning demonstrated prejudice into "no prejudice" "as a matter of law."

III. PETITIONER'S CLAIM REGARDING THE FAILURE TO OBTAIN CO-COUNSEL IS PROPERLY BEFORE THIS COURT AND WARRANTS REVIEW.

Respondent argues that petitioner did not raise the claim in cross-appeal to the Supreme Court of Georgia that failure of his trial counsel to obtain co-counsel in his death penalty trial, contrary to ABA Guideline 2.1 and this Court's findings in *Strickland*, *Williams*, and *Wiggins*, constituted prejudicial ineffective assistance. This claim, including the constitutional aspect of the claim, was indeed raised upon cross appeal:

> The ineffective assistance of counsel in Petitioner's case stemmed in part from the fact

> that the trial court denied Petitioner's requests for appointment of co-counsel. The 1989 American Bar Association Guidelines in effect at the time of Brannon's trial state: "In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant." ABA Guideline 2.1. The commentary to this guideline explains that "*the defendant [in a capital case] is constitutionally entitled to legal assistance of sufficient quality so as to prepare an adequate defense at trial* .... In the context of capital litigation, this mandate is difficult to fulfill where the heavy responsibilities of representation are placed in the hands of a single attorney."

Brief of Cross Appellant at 19-20 (emphasis added). Petitioner went on to argue that the "trial court's decision resulted in a denial of representation for Lance that comported with accepted professional norms and standards for adequate representation in a death penalty case.... The constraints Brannon faced materially contributed to his failure to discover and present significant evident to the Trial Court, to Lance's great prejudice." *Id.* at 21-22. Because petitioner raised this claim before the Georgia Supreme Court below, it is properly before this Court for review.

In addition, the fact that petitioner was denied co-counsel in his death penalty trial, contrary to ABA Guidelines, which this Court has found articulate reasonable standards regarding effective assistance of counsel, represents a constitutional question

implicating the Sixth Amendment.[1] *Wiggins*, 539 U.S. at 522 citing *Strickland*, 466 U.S. at 688-89 (commenting on trial counsel's duty to investigate: "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable"). The Georgia Supreme Court failed to recognize that ineffective assistance stemming from this infirmity conflicts with guidelines promulgated by the American Bar Association regarding the defense of capital cases and cannot be squared with this Court's precedent. Whether petitioner's Sixth Amendment rights to effective assistance of counsel were violated by the failure of the trial court to allow petitioner the benefit of co-counsel in his death penalty trial is a constitutional question properly before this Court for review.

Finally, petitioner was prejudiced by the trial court's failure to appoint co-counsel because it placed trial counsel, a sole practitioner, in an untenable situation. As petitioner described in cross appeal to the Georgia Supreme Court: "[Brannon] had too much to do in the limited time he had and with the limited resources available in a sole practitioner's office. By Mr. Brannon's own account, he was unable to investigate the 30 prior incidents that the State gave notice it intended to rely on at trial or even to

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[1] Contrary to Footnote 3 of Respondent's Brief in Opposition, that petitioner argued in the context of an ineffective assistance of counsel claim that he should have had the benefit of co-counsel at his death penalty trial reflects a distinction without a difference. The argument that effective assistance of counsel as required by the Sixth Amendment mandates the assistance of two attorneys in a capital case does in fact represent a constitutional question.

interview all of the witnesses on the State's witness list." Brief of Cross Appellant at 21. Because petitioner's trial counsel could not, by himself, investigate and present all available evidence regarding petitioner's mental health, the jury was not informed of mitigating mental health evidence that could have persuaded a single juror to spare his life at the sentencing phase of his trial. The fact that petitioner's counsel utterly failed to present any mitigating mental health evidence to the jury caused petitioner great prejudice and rendered his death sentence fundamentally unfair.

IV. CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court summarily reverse the judgment of the Supreme Court of Georgia because that court's decision contravenes established law. If the Court does not order summary reversal, it should grant certiorari to address the important, recurring issues of federal law raised in this petition.

This 8th day of June, 2010.

Respectfully Submitted,

L. Joseph Loveland
Counsel of Record
James W. Boswell
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: 404-572-4600
Facsimile: 404-572-5100
jloveland@kslaw.com

Attorneys for Petitioner
Donnie Cleveland Lance